

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

PHYLLIS H. WITCHER

CIVIL ACTION

v.

NO. 95-5568

MURRAY H. WITCHER, et al.

MEMORANDUM

Broderick, J.

October 14, 1997

Plaintiff Phyllis Witcher brings this pro se civil action against Murray H. Witcher ("Witcher"); Beneficial Mutual Savings Bank ("Beneficial"); Fidelity Bond and Mortgage Co. ("Fidelity"); TA Title Insurance Company (formerly Title Abstract Company) ("TA Title" and "Title Abstract"); E.I. Du Pont de Nemours & Company ("Du Pont"); Wilmington Trust Company ("Wilmington Trust"); the Office of the Recorder of Deeds in Delaware County ("Recorder of Deeds"); Grand National Bank ("Grand National"); and Nicholas Scafidi, Esq. and Leslie Carson, Jr., Esq. ("Scafidi and Carson").

Plaintiff's complaint was originally filed in October 1995, when the first Judge to whom this case was assigned granted Plaintiff's motion for leave to proceed in forma pauperis, but dismissed without prejudice Plaintiff's pro se complaint as frivolous pursuant to 28 U.S.C. § 1915. On October 24, 1995, the Plaintiff filed an amended complaint. In July 1996 the Plaintiff

filed another "amended" complaint which was in fact a copy of the Plaintiff's amended complaint of October 24, 1995. This case was assigned to this Judge on December 4, 1996, after four previous Judges to whom the case was assigned recused themselves. At that time no action had been taken to effect service of process on the Defendants, and this Court issued an order on January 10, 1997, ordering the U.S. Marshal to effect service of process pursuant to Fed.R.Civ.P. 4(c)(1). All defendants were subsequently served with Plaintiff's amended complaint by March 21, 1997.

Presently pending before the Court are six motions to dismiss. Defendants Witcher, Du Pont, Fidelity, Beneficial, Wilmington Trust and Scafidi and Carson filed motions to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). Defendants Du Pont, Fidelity, Beneficial, and Wilmington Trust also move to dismiss pursuant to Fed.R.Civ.P. 12(b)(1). Plaintiff has filed responses to all of these motions.

Because she is proceeding pro se, the Court holds Plaintiff's allegations "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519 (1970). Pursuant to Haines, the Court will consider Plaintiff's amended complaint as having possibly alleged three federal causes of action. Plaintiff attempts to allege that the Defendants violated § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., in that

they conspired together to defraud her of her property and committed acts of mail and wire fraud in furtherance of that conspiracy. Plaintiff also attempts to allege that the defendants violated § 1962(d) of RICO in that they conspired to violate § 1962(c). Plaintiff mentions § 1962(a) of RICO, but Plaintiff's amended complaint can in no way support a 1962(a) violation. Finally, Plaintiff attempts to allege that defendants violated her civil rights as a basis for a 42 U.S.C. § 1983 cause of action.

For the reasons given below, pursuant to Fed.R.Civ.P. 12(b)(6), the Court will dismiss with prejudice Plaintiff's amended complaint as to all of the Defendants on the grounds that the amended complaint fails to allege facts that could in any way support a RICO violation because it fails to allege the existence of an enterprise or a pattern of racketeering activity. The amended complaint also fails to allege any violation of § 1983 in that it contains no allegation of state action nor does it contain any facts which would support a claim of a constitutional violation.

I. Background

The allegations in Plaintiff's amended complaint can be summarized as follows: In 1979, Plaintiff and her then husband (later divorced) Defendant Witcher sold a house in Illinois to Mr. Witcher's employer, Defendant Du Pont. From the sale, the

Witchers received a check for \$50,000, which Mr. Witcher allegedly deposited and then withdrew from their joint checking account at Defendant Wilmington Trust. Plaintiff alleges that Wilmington Trust should have required her signature for these transactions. Allegedly using the money he withdrew from their account, Mr. Witcher purchased a home in Chadds Ford, Pennsylvania. Plaintiff alleges that Mr. Witcher titled the house in his name only by recording a forged deed which had originally included Plaintiff's name but which had been altered with correction fluid to eliminate any references to her. Plaintiff alleges that the following Defendants were aware that Mr. Witcher was in the process of defrauding her out of her share of the proceeds of the 1979 sale of the Illinois house: Fidelity, the original mortgagee; TA Title Abstract/Title Insurance; and the Office of the Recorder of Deeds of Delaware County, where the deed was recorded. In 1980 Mr. Witcher transferred an interest in the Chadds Ford house to Plaintiff, after which they owned the house jointly. Plaintiff alleges that she was never a party to the mortgage.

In 1986 the Witchers separated. Plaintiff alleges that each year from 1987 through 1991, Beneficial, to whom Fidelity sold the mortgage in 1979, mailed a mortgage payment coupon book to her, with only her name on the computer-generated payment coupons. Plaintiff alleges that Beneficial knew she was not in

fact the mortgagor, but that it sent the coupons to induce her to make payments. Plaintiff alleges that Mr. Witcher, who was the mortgagor, also induced her to make the mortgage payments or risk losing her home. Believing herself to be a mortgagor, Mrs. Witcher made payments of approximately \$1200 per month from 1987 through 1991. When she was no longer able to make payments, Beneficial informed her for the first time that she was not liable on the mortgage. Sometime later, Beneficial foreclosed on the house, which was sold at sheriff's sale to Wilmington Trust. Wilmington Trust is currently in the process of evicting Plaintiff.

II. Standard of Review for a 12(b)(6) Motion

When reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all factual allegations contained in the complaint as well as all the reasonable inferences that may be drawn from those allegations, and view them in the light most favorable to the non-moving party. Zlotnick v. TIE Communications, 836 F.2d 818, 819 (3rd Cir. 1988). The motion should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957).

III. Discussion

A. Plaintiff's RICO Claims

RICO creates a federal civil cause of action by "[a]ny person injured in his business or property by reason of a violation of § 1962." 18 U.S.C. § 1964(c). Section 1962(c) makes it unlawful for any person employed by or associated with an enterprise which affects interstate commerce to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962(c). To state a RICO claim under § 1962(c), a plaintiff must allege (1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he participated through a pattern of racketeering activity. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3rd Cir. 1989).

Among the essential elements of a RICO § 1962(c) claim is the existence of an enterprise. An enterprise is a de facto or de jure association through which a defendant engages in a pattern of racketeering activity. 18 U.S.C. § 1961(4); Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 789 (3rd Cir. 1984). An "enterprise" is not a "pattern of racketeering activity," but is an entity separate and apart from the pattern of activity in which it engages. United States v. Turkette, 452 U.S. 576, 584, 101 S.Ct. 2524, 2529 (1981).

Furthermore, under RICO § 1962(c), an enterprise must be a distinct entity from the defendant. Kehr Packages, Inc. V. Fidelcor, Inc., 926 F.2d 1406, 1411 (3rd Cir. 1991). When there are multiple defendants, an allegation of "a conspiracy to perform the underlying criminal offenses, standing alone, is not sufficient to allege the existence of an enterprise." Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 790 n.5 (3rd Cir. 1984). Plaintiff's § 1962(c) claim fails because she alleges no facts pointing to the existence of an enterprise which is distinct from the Defendants or the Defendants' alleged conspiracy to defraud her.

Another essential element of a RICO § 1962(c) is that the defendant participated in an enterprise through a pattern of racketeering activity. To establish a pattern of racketeering activity, a plaintiff must first allege at least two acts of racketeering activity within a ten year period. 18 U.S.C. § 1961(5). "Racketeering activity" includes several state law crimes such as murder, kidnaping, gambling and bribery, as well as a list of specific federal crimes including mail fraud, 18 U.S.C. § 1341. 18 U.S.C. § 1961(1). Second, in order to establish a pattern, a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell, 492 U.S. 229, 239 (1989). Plaintiff alleges that Beneficial

committed mail fraud in that it mailed her the mortgage payment coupon books knowing that Plaintiff was not actually liable on the mortgage. Even accepting that Beneficial knew Plaintiff was not liable on the mortgage, it is questionable whether Beneficial's mailing of the mortgage coupon books to Plaintiff, a joint owner living in the house, rises to the level of a pattern of racketeering activity. Thus, because Plaintiff fails to allege either the existence of an enterprise or a pattern of racketeering activity, her RICO claim under § 1962(c) fails.

Plaintiff throws in a reference to RICO § 1962(a), but she does not allege that she was "injured specifically by the use or investment of income in any enterprise, as is required under section 1962(a)." Banks v. Wolk, 918 F.2d 418, 421 (3rd Cir. 1990). Therefore, Plaintiff does not allege a claim under RICO § 1962(a).

Finally, RICO makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). However, a conspiracy claim under § 1962(d) based on a conspiracy to violate one of the other subsections of § 1962 must fail if the substantive claims under the other subsections are deficient. Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3rd Cir. 1993). Therefore, because Plaintiff does not state a claim under subsections (a) through (c) of § 1962, her conspiracy claim under subsection (d)

also fails.

C. Plaintiff's § 1983 Claim

In order to establish a claim under § 1983, a plaintiff must show that the defendant, while acting under color of state law, knowingly caused a deprivation of a right or privilege guaranteed by the Constitution or created by a federal statute. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). Plaintiff invokes this Court's jurisdiction under Title 42 U.S.C. § 1983, and claims that she "was having her civil rights violated and none of the defendants would allow her due process." (Amended Complaint ¶ 24). She also alleges that the Defendants "conspired ... to deny her equal protection of the laws." (Amended Complaint ¶ 75). However, nowhere does Plaintiff allege that the Defendants acted under color of state law, nor does she point to any facts which would support a claim of a constitutional violation. Thus, Plaintiff fails to state a civil rights claim under 42 U.S.C. § 1983.

D. The State Law Claims

Plaintiff also alleges various state law claims. A district court has supplemental jurisdiction over state claims which form part of the same case or controversy as the federal claim over which the court has original jurisdiction. 28 U.S.C. § 1367(a). However, a court may decline to exercise supplemental jurisdiction over such a state claim if the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. §

1367(c)(3). Upon dismissal of Plaintiff's RICO claims and her § 1983 claim, no federal issues will remain. Therefore, the Court will exercise its discretion and decline to hear the state claims as well.

VI. Conclusion

The motions to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) brought by Defendants Witcher, Beneficial, Fidelity, Du Pont, Wilmington Trust, and Scafidi and Carson will be granted as to all of the Defendants, including TA Title, Title Abstract, Grand National, and the Recorder of Deeds; and since it appears beyond doubt that Plaintiff can prove no set of facts which would provide her with a federal cause of action against any of the Defendants, Plaintiff's Amended Complaint will be dismissed with prejudice as to all of the Defendants.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

PHYLLIS H. WITCHER

v.

MURRAY H. WITCHER, et al.

CIVIL ACTION

NO. 95-5568

ORDER

AND NOW, this 14th day of October, 1997; Defendants Murray H. Witcher, Beneficial Mutual Savings Bank, Fidelity Bond and Mortgage Co., E.I. Du Pont de Nemours & Company, Wilmington Trust Company, Nicholas Scafidi, and Leslie Carson, Jr. having filed motions to dismiss Plaintiff's amended complaint for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6);

IT IS ORDERED: The motions to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) brought by Defendants Witcher, Beneficial, Fidelity, Du Pont, Wilmington Trust, and Scafidi and Carson (Document Nos. 23, 25, 29, 30, and 38), are **GRANTED** as to all of the Defendants, including TA Title Insurance Company, Title Abstract Company, Grand National Bank, and the Office of the Recorder of Deeds in Delaware County; and since it appears beyond doubt that Plaintiff can prove no set of facts which would provide her with a federal cause of action against any of these Defendants, Plaintiff's Amended Complaint is **DISMISSED WITH PREJUDICE** as to all of the Defendants;

IT IS FURTHER ORDERED: The remaining state law claims are **DISMISSED WITHOUT PRJUDICE** to Plaintiff's rights to transfer these alleged causes of action to state court pursuant to the transfer provisions of 42 Pa.Cons.Stat.Ann. § 5103(b).

RAYMOND J. BRODERICK, J